

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

LA QUAN PHILLIPS,)	Case No.: 2:10-cv-02068-GMN-PAL
)	
Plaintiff,)	ORDER
vs.)	
)	
CLARK COUNTY SCHOOL DISTRICT;)	
NATIONAL UNION FIRE INSURANCE)	
COMPANY OF PITTSBURGH, PA; DOE)	
EMPLOYEES 1 THROUGH 20; DOES 1)	
THROUGH 20; ROE ENTITEIS 1)	
THROUGH 20; AND ROE)	
COROPRATIONS 1 THROUGH 20,)	
Defendants.)	

INTRODUCTION

Before the Court is Plaintiff La Quan Phillips Motion to Remand (ECF No. 11). Defendant Clark County School District filed a Response (ECF No. 15) as did Defendant National Union Fire Insurance Company of Pittsburgh, PA (ECF No. 16). Plaintiff filed two Replies (ECF No. 17& 19).

Also before the Court, is Defendant Clark County School District's Motion to Dismiss (ECF No. 4). Plaintiff filed a Response (ECF No. 10) and Clark County School District filed a Reply (ECF No. 12).

FACTS AND BACKGROUND

The instant case arose when Plaintiff, La Quan Phillips very tragically sustained a severe injury to his spine during a high school football game and was subsequently denied coverage by Defendant, National Union Fire Insurance Company of Pittsburg, PA (hereinafter "National Union"). National Union contracted with Defendant Clark County School District (hereinafter "CCSD") for a disability insurance policy to provide

1 coverage for its student athletes who sustain catastrophic injuries during interscholastic
2 activities. National Union denied Plaintiff coverage because the injuries that he sustained
3 did not meet the policy's definitions of "disability" and "paralysis."

4 Plaintiff originally brought suit in the Eighth Judicial District Court, State of
5 Nevada against National Union for denying his full claim. However, Plaintiff also
6 brought suit against CCSD alleging that the school district did not exercise reasonable
7 care when they purchased the disability insurance policy. Defendant National Union
8 subsequently filed a petition for removal to this court. Defendant National Union claims
9 that Plaintiff has fraudulently joined CCSD in order to destroy diversity of citizenship
10 subject matter jurisdiction in the federal court.

11 **DISCUSSION**

12 **A. Legal Standard**

13 "If at any time before final judgment it appears that the district court lacks subject
14 matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). District courts
15 have subject matter jurisdiction over civil actions where no plaintiff is a citizen of the
16 same state as a defendant and the amount in controversy exceeds \$75,000. 28 U.S.C. §
17 1332(a). A civil action brought in state court may be removed by the defendants to a
18 federal district court when the federal court would have had original jurisdiction over the
19 matter. 28 U.S.C. § 1441(a).

20 Defendant National Union Fire Insurance Company of Pittsburgh, PA ("National
21 Union") removed this action to federal court based on diversity of citizenship. Both
22 Plaintiff and Defendant CCSD are citizens of Nevada for diversity purposes thereby
23 precluding diversity jurisdiction. Accordingly, National Union and CCSD argue that
24 CCSD was fraudulently joined such that its citizenship should be disregarded.
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1 Removal statutes are strictly construed against removal jurisdiction. *Ritchey v.*
2 *Upjohn Drug Co.*, 139 F.3d 1313, 1317 (9th Cir. 1998); *Gaus v. Miles*, 980 F.2d 564,
3 566 (9th Cir. 1992). “Federal jurisdiction must be rejected if there is any doubt as to the
4 right of removal in the first instance.” *Id.* (quoting *Libhart v. Santa Monica Dairy Co.*,
5 592 F.2d 1062, 1064 (9th Cir. 1979)). The defendant always has the burden of
6 establishing that removal is proper. *Gaus*, 980 F.2d at 566.

7 “[F]raudulently joined defendants will not defeat removal on diversity grounds.”
8 *Ritchey*, 139 F.3d at 1318. There are two ways to establish fraudulent joinder: (1) the
9 defendant may facially attack plaintiff’s complaint by showing the inability of the
10 plaintiff to establish a cause of action against the non-diverse defendant based on the
11 plaintiff’s allegations or (2) the defendant may attempt to disprove jurisdictional facts
12 alleged in the plaintiff’s pleadings. *See Hunter v. Philip Morris USA*, 582 F.3d 1039,
13 1044 (9th Cir. 2009) (citing *Smallwood v. Illinois Central R.R. Co.*, 385 F.3d 568, 573
14 (5th Cir. 2004) (en banc)); *Knutson v. Allis-Chalmers Corp.*, 358 F. Supp. 2d 983, 995
15 (D. Nev. 2005).

16 In this case, Defendants argue that Plaintiff has failed to state a claim against
17 Defendant CCSD. Federal Rule of Civil Procedure 12(b)(6) mandates that a court
18 dismiss a cause of action when the plaintiff fails to state a claim upon which relief can be
19 granted. *See N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). When
20 considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal
21 is appropriate when the complaint does not give the defendant fair notice of a legally
22 cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550
23 U.S. 544, 555, 127 S.Ct. 1955, (2007). In considering whether the complaint is sufficient
24 to state a claim, a court takes all material allegations as true and construes them in the
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1 light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th
2 Cir.1986).

3 Plaintiff alleges five causes of action against both Defendants: (1) breach of
4 contract (2) violation of Nevada's unfair claims practices act; (3) breach of the covenant
5 of good faith and fair dealing; (4) negligence; and (5) unconscionability.

6 Defendants argue that the first two causes of action fail to state a claim against
7 CCSD: there are no factual allegations that CCSD ever breached a contract and because
8 CCSD cannot violate Nevada's Unfair Claims Practices Act because it is not an insurer or
9 a broker of insurance. Plaintiff only argues that CCSD was a middle man between
10 National Union and La Quan and that CCSD violated the Nevada's Unfair Claims
11 Practices Act because CCSD did not inform La Quan of the insurance policy promptly.

12 In the third cause of action, Plaintiff alleges that "Defendant" denied Plaintiff
13 insurance benefits and that such constitutes a breach of the covenant of good faith and
14 fair dealing. Thus, Defendants reason that the third cause of action cannot be construed
15 to allege any wrongdoing by CCSD because they did not deny insurance benefits to
16 Plaintiff. Plaintiff does not respond directly to CCSD's arguments concerning these three
17 causes of action. The Court finds that Plaintiff has failed to state a claim against CCSD
18 for these three causes of action for the reasons stated by Defendants and therefore
19 dismisses them with respect to CCSD.

20 Plaintiff's fourth cause of action alleges that Defendants were negligent.
21 Defendant CCSD argues that it cannot be negligent in purchasing the insurance policy
22 because it had no duty to purchase an insurance policy. The fifth cause of action for
23 unconscionability also arises out of Defendant CCSD's alleged duty to purchase an
24 insurance policy for its student. The court will now examine whether or not Plaintiff has
25 stated a claim for negligence and unconscionability against CCSD.

1 **1. Negligence**

2 In Nevada, a claim for negligence requires that a plaintiff satisfy four elements: (1)
3 the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty;
4 (3) the breach was the legal cause of the plaintiff's injury; and (4) the plaintiff suffered
5 damages. *Wiley v. Redd*, 885 P.2d 592, 596 (Nev. 1994). Under the facts alleged in this
6 case, the issue is whether or not a school owes a duty of care to a student to purchase an
7 insurance policy to cover catastrophic events.

8 This is an issue of first impression, as no court in Nevada has had occasion to
9 issue an opinion in a case that involved the facts of the present case. Where a state has
10 not addressed a particular issue, a federal court must attempt to predict how the highest
11 state court would decide the issue using decisions from other jurisdictions, statutes, and
12 restatements as guidance. *Strother v. S. Cal. Permanete Med. Group*, 79 F.3d 859, 865
13 (9th Cir. 1996); *See Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc.*, 306 F.3d 806,
14 812 (9th Cir. 2002).

15 Plaintiff argues that the Ninth Circuit has held that a school district is responsible
16 and has a duty to exercise reasonable care when it comes to protecting the student while
17 they are on school grounds so long as the injury or harm is foreseeable. *Van Ort v. Estate*
18 *of Stanewich*, 92 F.3d 831 (9th Cir. 1996). He asserts that "[t]he foreseeability of harm is
19 a predicate to establishing the element of duty." *Drakis v. Scheffer*, 111 Nev. 817, 820
20 (Nev. 1995). Plaintiff argues that by purchasing the subject insurance policy to insure its
21 students in the event of catastrophic injury, it was foreseeable to CCSD that such injuries
22 may happen. Plaintiff also asserts that it was foreseeable to CCSD that entering into a
23 vague and ambiguous insurance policy could have "disastrous consequences for its
24 student athletes." However, Plaintiff admits that he was unaware that the insurance
25 policy in question existed. (*See* Motion to Remand 5:14-15, ECF No. 11.)

1 Defendants argue that a public school has no duty to purchase insurance for its
2 students to protect them against any injuries. This assertion is confirmed by the inability
3 of every party to identify any Nevada statute or common law that imposes such a duty,
4 and therefore this Court is unable to find that a school owes a duty to its student athletes
5 to purchase an insurance policy.

6 Defendants also argue that this Court should adopt the same reasoning of the
7 Supreme Court of Kansas when it rejected the proposition that once a school exercises its
8 discretion to purchase insurance, it becomes obligated to purchase insurance coverage
9 that the beneficiary believes is “adequate” to his or her personal needs. In *Wicina v.*
10 *Strecker*, 747 P.2d 167 (Kan. 1987), a private high school purchased medical insurance
11 coverage for its students. When a student was injured during a football game rendering
12 him permanently quadriplegic, the *Wicina* court concluded that there was no statutory,
13 contractual or common law duty to provide insurance or to inform the plaintiff regarding
14 the medical insurance which it purchased. While a school, in its discretion, could
15 purchase insurance, the specific Kansas statute in question in *Wicina* was found to not
16 place a duty on a public school to purchase insurance.

17 Plaintiff distinguishes *Wicina* on the grounds that the school in that case was a
18 private school and because the school had only purchased a medical insurance policy not
19 coverage for disability. These distinguishing facts, however, do not change the public
20 policy reasoning behind the *Wicina* court’s decision. That court reasoned that public
21 policy considerations forbid the court from imposing upon a private school a greater duty
22 than that imposed on the public schools. The court explained that if private schools could
23 be held liable for insufficient coverage, then

24 private schools that refuse to purchase any type of medical insurance would
25 owe no duty to an injured or disabled student and would not be subject to
liability. Private schools purchasing insurance would face the prospect of

1 actions when the insurance coverage was not broad enough or the amount
2 of coverage was not sufficient to compensate the injured student. Private
3 schools would be forced to take the safe course and would simply refuse to
4 purchase any insurance for their students.

5 *Id.* at 173.

6 Likewise, in light of the fact that there is no statutory requirement that schools
7 purchase insurance for its students, if this Court were to find a common law duty to
8 purchase “adequate” insurance to compensate an injured student, schools could choose
9 the safe course and simply refuse to purchase any insurance to cover their students.

10 Although distinguishable, the facts of *Wicina* are sufficiently similar to justify
11 applying the same reasoning in this case. “[CCSD’s] failure to purchase [adequate]
12 disability insurance did not increase the risk of the plaintiff being injured while playing
13 football nor did plaintiff rely upon the [Defendant’s] promise to purchase disability
14 insurance when he decided to play football.” *Wicina*, 747 P.2d at 172-73.

15 Plaintiff’s would like this court to take a logical leap from the affirmative duty
16 imposed on the school by the Ninth Circuit’s decision in the *Van Ort* case requiring
17 schools to protect students from negligent acts of third parties, to include an affirmative
18 duty to procure adequate insurance policies. 92 F.3d 831. Legislators have not required
19 public schools to purchase insurance coverage and this court finds that it would be
20 against public policy to punish schools that choose to purchase insurance coverage for
21 their student athletes by holding them to a higher standard of liability than schools which
22 choose not to purchase insurance. This court has not found any common-law, statutory,
23 or contractual duty which requires a school to take additional reasonable steps to
24 purchase an unambiguous insurance policy when a school exercises its discretion and
25 decides to purchase insurance to cover its student athletes. Under the facts of this case,
the parties have failed to present any reason why this court should impose such a duty
and declines to do so.

1 Plaintiff also attempts to establish that a school has a duty to inform its students of
 2 any insurance policies it does obtain. However, Plaintiff again fails to cite to any statute
 3 or common law that imposes such a duty on a school.

4 In conjunction with this argument Plaintiff argues that CCSD is an indispensable
 5 party under Fed. R. Civ. P. 19. The Court does not find that CCSD is an “indispensable”
 6 party. Under Rule 19, “indispensable” refers to a party whose participation is so
 7 important to the resolution of the case that, if not joined, the suit must be dismissed. *See*
 8 *Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 867, fn. 5
 9 (9th Cir. 2004). Plaintiff, as a third party beneficiary to the insurance contract, has a
 10 direct action against National Union, as promisor in contract. *Hemphill v. Hanson*, 366
 11 P.2d 92, 94 n. 1 (Nev. 1961). Plaintiff’s claims against National Union are viable without
 12 the presence of CCSD in this suit and Plaintiff can be afforded adequate relief from
 13 National Union.

14 Accordingly, Plaintiff has failed to state a claim of negligence against Defendant
 15 CCSD and the fourth cause of action is dismissed.

16 **2. Unconscionability**

17 Plaintiff’s fifth claim for relief is confusing and contradictory. The Complaint
 18 states:

19 Defendant, knowing that the intended and expected beneficiaries of the
 20 aforementioned policy of insurance would be afforded no foreknowledge of
 21 its extent, coverages, exclusions, deductibles, definitions or terms, and
 22 would further have no bargaining power relative to same, nonetheless
 23 defined terms therein in impermissible and unconscionably narrow and
 restrictive ways, resulting in premiums being paid for insurance which
 would pay no benefit for injuries reasonably understood to be paralyzing or
 “catastrophic,” thereby creating an illusion of coverage where none existed.

24 (Complaint, Ex.A, ECF No. 1-1.) Plaintiff argues that he did not know of the insurance
 25 policy in question. (*See* Motion to Remand, 10:23-26, ECF No. 11.) Yet, he alleges that

1 there was an illusion of coverage where none actually existed. There is no evidence that
2 Plaintiff's decision to play football was influenced by the existence or terms of the
3 insurance policy. Therefore, Plaintiff has failed to state a claim for unconscionability.

4 **B. Analysis**

5 The Court finds that Defendant CCSD has been fraudulently joined and therefore
6 CCSD's citizenship should be ignored for removal purposes. Plaintiff is a citizen of
7 Nevada and Defendant National Union is incorporated under the laws of the
8 Commonwealth of Pennsylvania, with its principal place of business in the State of New
9 York, and is thus a citizen of both Pennsylvania and New York. Plaintiff has alleged an
10 amount in controversy in excess of \$75,000 because Plaintiff has made a claim against
11 the policy limit of \$2,500,000. Defendant National Union was served with the complaint
12 on October 26, 2010 and filed their Notice of Removal on November 24, 2010. Thus, the
13 removal was timely under 28 U.S.C. § 1446(b). Accordingly, there is diversity of
14 citizenship and this case was properly removed to federal district court.

15 Furthermore, for the reasons given *supra*, Plaintiff has failed to state a claim for
16 relief against Defendant CCSD. Accordingly, the Court dismisses the complaint against
17 CCSD pursuant to Fed. R. Civ. P. 12(b)(6).

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CONCLUSION

IT IS HEREBY ORDERED that Plaintiff La Quan Phillips Motion to Remand (ECF No. 11) is DENIED.

IT IS FURTHER ORDERED that Defendant Clark County School District's Motion to Dismiss (ECF No. 4) is GRANTED. Defendant Clark County School District is DISMISSED from this action.

DATED this 13 day of September, 2011.



Gloria M. Navarro
United States District Judge